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DEPARTMENT OF COMMERCE  
International Trade Administration  
[C-570-980]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Initiation of Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce

EFFECTIVE DATE: [Insert date of publication in the Federal Register.]

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SUPPLEMENTARY INFORMATION

The Petition

On October 19, 2011, the Department of Commerce (Department) received a countervailing duty (CVD) petition concerning imports of crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (PRC) filed in proper form by SolarWorld Industries America Inc. (Petitioner). See Petition for the Imposition of Antidumping and Countervailing Duties Against Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, dated October 19, 2011 (Petition).

On October 21, 24 and 31, 2011, and November 4, 2011, the Department issued supplemental questionnaires requesting information and clarification of certain areas of the Petition.

On October 24, 2011, the Department issued requests to Petitioner for additional information and for clarification of certain areas of the general issues, antidumping (AD), and CVD

sections of the Petition. Based on the Department's requests, Petitioner filed a supplement to the Petition regarding the CVD section on October 26, 2011 (Supplement I), and requested an extension until October 28, 2011, for the AD and general issues supplemental questionnaire. On October 28, 2011, Petitioner filed the supplement to the Petition regarding the AD and general issues section (Supplement II-A – General Issues and Supplement II-B –AD Issues). On October 31, 2011, the Department issued an additional request for information, which Petitioner filed on November 2, 2011 (Supplement III), November 4, 2011 (Supplement IV) and November 7, 2011 (Supplement V-A-AD Issues and Supplement V-B-General Issues).

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), Petitioner alleges that producers/exporters of solar cells from the PRC received countervailable subsidies within the meaning of sections 701 and 771(5) of the Act, and that imports from these producers/exporters materially injure, and threaten further material injury to, an industry in the United States.

The Department finds that Petitioner filed the Petition on behalf of the domestic industry because Petitioner is an interested party, as defined in section 771(9)(C) of the Act, and has demonstrated sufficient industry support with respect to the investigation that it requests the Department to initiate. See "Determination of Industry Support for the Petition," below.

#### Period of Investigation

The period of investigation (POI) is January 1, 2010, through December 31, 2010.

#### Scope of the Investigation

The products covered by the scope of this investigation are solar cells from the PRC. For a full description of the scope of the investigation, see the "Scope of the Investigation," in Appendix I of this notice.

### Comments on Scope of the Investigation

During our review of the Petition, we discussed the scope with Petitioner to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Petitioner submitted revised scope language on November 4, 2011, and November 7, 2011. The November 7, 2011, submission included various revisions. Among these revisions was the following substantive provision:

These proceedings cover crystalline silicon PV cells, whether exported directly to the United States or via third countries; crystalline silicon PV modules/panels produced in the PRC, regardless of country of manufacture of the cells used to produce the modules or panels, and whether exported directly to the United States or via third countries, and crystalline silicon PV modules or panels produced in a third country from crystalline silicon PV cells manufactured in the PRC, whether exported directly to the United States or via third countries.

The Department has not adopted this specific revision recommended by Petitioner for the purposes of initiation.<sup>1</sup> Because Petitioner's November 7, 2011, scope submission was filed one day prior to the statutory deadline for initiation, the Department has had neither the time nor the administrative resources to evaluate Petitioner's proposed language regarding merchandise produced using inputs from third-country markets, or merchandise processed in third-country markets. Petitioner's November 7, 2011, scope submission also contained the following language:

Unless explicitly excluded from the scope of these proceedings, crystalline silicon PV cells possessing the physical characteristics of subject merchandise are covered by these proceedings.

The Department has not adopted this specific revision recommended by Petitioner for the purposes of initiation because this language is superfluous, and appears to add no additional clarification as to the description of merchandise covered by the scope of the Petition. However, as discussed in the preamble to the regulations, we are setting aside a period for interested parties to raise issues

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<sup>1</sup> We note that the Department has independent authority to determine the scope of its investigations. See Diversified Products Corp. v. United States, 572 F. Supp. 883, 887 (CIT 1983).

regarding product coverage. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27323 (May 19, 1997). The Department encourages interested parties to submit such comments by Monday, November 28, 2011, which is twenty calendar days from the signature date of this notice. All comments must be filed on the records of both the PRC AD investigation as well as the PRC CVD investigation. Comments must be filed electronically through Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS), <http://iaaccess.trade.gov>, in accordance with 19 CFR 351.303. See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures, 76 FR 39263 (July 6, 2011). The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination.

#### Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, on October 20, 2011, the Department invited representatives of the Government of the PRC (GOC) for consultations with respect to the CVD petition. On November 2, 2011, the Department held consultations with representatives of the GOC via conference call. See Memorandum to the File, regarding "Consultations with Officials from the Government of the People's Republic of China on the Countervailing Duty Petition Regarding Certain Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules," dated November 4, 2011 (Consultations Memorandum).

#### Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the

domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the “industry” as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether “the domestic industry” has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (see section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department’s determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. See USEC, Inc. v. United States, 132 F. Supp. 2d 1, 8 (CIT 2001), citing Algoma Steel Corp., Ltd. v. United States, 688 F. Supp. 639, 644 (CIT 1988), aff’d 865 F.2d 240 (Fed. Cir. 1989), cert. denied 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.” Thus, the reference point from which the domestic like product analysis begins is “the article subject to an investigation” (i.e., the class or kind of merchandise to

be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, Petitioner does not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that solar cells constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, see “Countervailing Duty Investigation Initiation Checklist: Certain Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China” (Initiation Checklist), at Attachment II, Analysis of Industry Support for the Petitions Covering Crystalline Silicon Photovoltaic Cells from the People’s Republic of China, on file electronically on IA ACCESS, accessible via the Central Records Unit, Room 7046 of the main Commerce building, and also accessible on the Web at <http://ia.ita.doc.gov/frn>. The paper copy and electronic versions of the Initiation Checklist are identical in content.

In determining whether Petitioner has standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the “Scope of Investigation” section, above. To establish industry support, Petitioner provided its production volume of the domestic like product in 2010, and compared this to the estimated total production volume of the domestic like product for the entire domestic industry. See Initiation Checklist at Attachment II. Petitioner estimated 2010 production volume of the domestic like product by non-petitioning companies based on production data published by an industry source, Photon International, along with affidavits of support for the Petition, and its knowledge of the industry. We have relied upon data Petitioner provided for purposes of measuring industry support. For further discussion, see Initiation Checklist at Attachment II.

On November 2, 2011, in its consultations with the Department, the Government of China raised the issue of industry support. See Consultations Memorandum; see also Initiation Checklist at Attachment II. On November 7, 2011, certain Chinese producers/exporters and affiliated importers of Solar Cells, interested parties to this proceeding as defined in section 771(9)(A) of the Act filed comments regarding industry support. Because the comments did not include certifications as required under 19 CFR 351.303(g), we allowed the parties to re-file the comments. On November 8, 2011, we received comments with proper certifications. On November 8, 2011, the same Chinese producers/exporters filed additional comments regarding industry support. However, those comments were not limited to industry support as required by section 732(c)(4)(E) of the Act. Accordingly, we rejected the comments as improperly filed. The interested parties re-filed this submission on November 8 and properly limited their comments to industry support.<sup>2</sup>

Based on information provided in the Petition, supplemental submissions, and other information readily available to the Department, we determine that the domestic producers and workers have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product. Because the Petition did not establish support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product, the Department was required to take further action in order to evaluate industry support. See section 702(c)(4)(D) of the Act. In this case, the Department was able to rely on other information, in accordance with section 702(c)(4)(D)(i) of the Act, to determine industry support. See Initiation Checklist at Attachment II; see also Memorandum to the File from Stephen Bailey, titled “Conference Call,” dated November 3, 2011. Based on information

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<sup>2</sup>For further discussion of these submissions see Initiation Checklist at Attachment II.

provided in the Petition, supplemental submissions, and additional information obtained by the Department, the domestic producers and workers have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act. See Initiation Checklist at Attachment II.

The Department finds that Petitioner filed the Petition on behalf of the domestic industry because it is an interested party as defined in sections 771(9)(C) of the Act and it has demonstrated sufficient industry support with respect to the CVD investigation that it is requesting the Department initiate. Id.

#### Injury Test

Because the PRC is a “Subsidies Agreement Country” within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

#### Allegations and Evidence of Material Injury and Causation

Petitioner alleges that imports of solar cells from the PRC are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the domestic industry producing solar cells. In addition, Petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

Petitioner contends that the industry’s injured condition is illustrated by reduced market share, reduced shipments, unused capacity, underselling and price depression or suppression,



reduced employment, a decline in financial performance, lost sales and revenue, and an increase in import penetration. See Volume I of the Petition, at 1-4, 25-44, and Exhibits I-6, I-8-9, I-14-16, I-17a, I-18a, I-19-20, I-21a, I-21b, I-22 and I-24, and Supplement II-A-General Issues, at 1-2. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. See Initiation Checklist at Attachment III, Injury.

#### Initiation of Countervailing Duty Investigation

Section 702(b)(i) of the Act requires the Department to initiate a CVD proceeding whenever an interested party files a petition on behalf of an industry that: (1) alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to the petitioner(s) supporting the allegations. The Department has examined the CVD Petition on solar cells from the PRC and finds that it complies with the requirements of section 702(b) of the Act. Therefore, in accordance with section 702(b) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, or exporters of solar cells in the PRC receive countervailable subsidies. For a discussion of evidence supporting our initiation determination, see Initiation Checklist.

We are including in our investigation the following programs alleged in the Petition to have provided countervailable subsidies to producers and exporters of the subject merchandise in the PRC:

#### A. Grant Programs

1. Export Product Research and Development Fund
2. Subsidies for Development of “Famous Brands” and “China World Top Brands”

3. Sub-Central Government Subsidies for Development of “Famous Brands” and “China World Top Brands”
4. Special Energy Fund (Established by Shandong Province)
5. Funds for Outward Expansion of Industries in Guangdong Province
6. Golden Sun Demonstration Program
- B. Government Provision of Goods and Services for Less Than Adequate Remuneration (LTAR)
  1. Government Provision of Polysilicon for LTAR
  2. Government Provision of Aluminum for LTAR
  3. Government Provision of Power for LTAR
- C. Government Provision of Land for LTAR
- D. Policy Lending to the Renewable Energy Industry
- E. Income and Other Direct Tax Exemption and Reduction Programs
  1. “Two Free, Three Half” Program for Foreign Invested Enterprises (FIEs)
  2. Income Tax Reductions for Export-Oriented FIEs
  3. Income Tax Benefits for FIEs Based on Geographic Location
  4. Local Income Tax Exemption and Reduction Programs for “Productive” FIEs
  5. Tax Reductions for FIEs Purchasing Chinese-Made Equipment
  6. Tax Offsets for Research and Development by FIEs
  7. Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises
  8. Preferential Tax Programs for FIEs Recognized as High or New Technology Enterprises
  9. Tax Reductions for High and New-Technology Enterprises Involved in Designated Projects
  10. Preferential Income Tax Policy for Enterprises in the Northeast Region
  11. Guangdong Province Tax Programs

## F. Indirect Tax and Tariff Exemption Programs

1. Value Added Tax (VAT) Exemptions for Use of Imported Equipment
2. VAT Rebates on FIE Purchases of Chinese-Made Equipment
3. VAT and Tariff Exemptions for Purchases of Fixed Assets Under the Foreign Trade Development Fund Program

## G. Export Credit Subsidy Programs

## H. Export Guarantees and Insurance for Green Technology

For a description of each of these programs and a full discussion of the Department's decision to initiate an investigation of these programs, see Initiation Checklist.

We are not including in our investigation the following programs alleged to benefit producers/exporters of the subject merchandise in the PRC.

## A. Grant Programs

1. Fund for Economic, Scientific, and Technology Development (Established by Foshan City)
2. Provincial Fund for Fiscal and Technological Innovation (Established by Guangdong Province)

## B. Government Provision of Water for LTAR

## C. Currency Undervaluation

For further information explaining why the Department is not initiating an investigation of these programs, see Initiation Checklist.

## Critical Circumstances

Petitioner alleges, based on trade statistics since August 2010 and prior knowledge of an impending trade case, that there is a reasonable basis to believe or suspect that critical circumstances exist with regard to imports of solar cells from the PRC. See Volume IV of the Petition, at 1, 7, and 10.

Section 703(e)(1) of the Act states that if a petitioner alleges critical circumstances, the Department will find that such circumstances exist, at any time after the date of initiation, when there is a reasonable basis to believe or suspect that under, subparagraph (A) the alleged countervailable subsidy is inconsistent with the Subsidies Agreement, and (B) there have been massive imports of the subject merchandise over a relatively short period. Section 351.206(h) of the Department's regulations defines "massive imports" as imports that have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration. Section 351.206(i) of the Department's regulations states that a relatively short period will normally be defined as the period beginning on the date the proceeding begins and ending at least three months later.

With regard to the subsidies alleged in the Petition, Petitioner notes that the subsidies alleged include subsidies based on export performance, subsidies for inputs provided for LTAR, as well as interest free or low interest loans that are not otherwise available to the general public. See Volume IV of the Petition, at 13. Petitioner argues that based on information provided in the Petition, it is clear that Chinese exporters and producers of subject merchandise have received subsidies that are inconsistent with the Agreement on Subsidies and Countervailing Measures. See Volume IV of the Petition, at 13-15; see also Volume III of the Petition.

With regard to the criteria of massive imports over a relatively short period of time, Petitioner argues that the Department should evaluate the level of imports during a period prior to the filing a petition because importers and foreign exporters and producers had reason to believe that an AD or CVD proceeding was likely. See Volume IV of the Petition, at 3-9, and Exhibits IV-1 through IV-16; see also 19 C.F.R 351.206(i). Petitioner contends that there were newspaper articles beginning in August 2009 that discussed unfair pricing on behalf of Chinese producers. See Volume IV of the Petition, at 4, and Exhibits IV-1 and IV-2. Petitioner further notes that the very

widely publicized closure of a large solar cell producer resulted in much media discussion of the effects of unfair trade in January 2011. Therefore, Petitioner states that “the effects of any behavioral shifts of Chinese producers would be likely to manifest themselves in February 2011 as shipments of goods ordered in the days immediately following Evergreen’s demise in January 2011 would not have reached the United States until February.” See Supplement II-A-General Issues, at 6. Thus, Petitioner demonstrates massive imports over a relatively short period of time by comparing imports of subject merchandise between the six-month period of August 2010 and January 2011 (base period) and the six-month period of February 2011 and July 2011 (comparison period). Based on Petitioner’s calculation, imports surged 220 percent between base period and comparison period, which is greater than the 15 percent threshold defined in the Department’s regulations. See Volume IV of the Petition, at 10-11; see also 19 C.F.R. 351.206(h).

Petitioner requests that the Department examine the information it has provided and make a preliminary finding of critical circumstances on an expedited basis, within 45 days of the filing of the Petition. See Volume IV of the Petition, at 1, 2, and 16; see also 19 C.F.R. 351.206(c)(2)(iii). Section 702(e) of the Act states that when there is a reasonable basis to suspect that the alleged countervailable subsidy is inconsistent with the Subsidies Agreement, the Department may request U.S. Customs and Border Protection (CBP) to compile information on an expedited basis regarding entries of the subject merchandise.

Taking into consideration the foregoing, we will analyze this matter further. We will monitor imports of solar cells from the PRC and we will request that CBP compile information on an expedited basis regarding entries of subject merchandise. See Section 702(e) of the Act. If, at any time, the criteria for a finding of critical circumstances are established, we will issue a critical circumstances finding at the earliest possible date. See Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations, 63 FR 55364 (October 15, 1998).

### Respondent Selection

For this investigation, the Department expects to select respondents based on CBP data for U.S. imports during the POI. We intend to make our decision regarding respondent selection within 20 days of publication of this Federal Register notice. The Department will release CBP data under Administrative Protective Order shortly after the signature date of this notice. Given that certain Harmonized Tariff Schedule of the United States headings used in the description of the scope of this investigation are for broad “basket categories” of merchandise (e.g., headings 8501.61.0000 and 8507.20.80), the Department intends to rely only on headings 8541.40.6020 and 8541.40.6030, which cover solar cells exclusively, in selecting respondents. Therefore, we will only release CBP data under those same two headings as well. The Department invites comments regarding the CBP data and respondent selection to be submitted to the Department within seven calendar days of publication of this Federal Register notice.

### Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to representatives of the GOC. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version to the GOC, consistent with 19 CFR 351.203(c)(2).

### ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

### Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of subsidized solar cells from the PRC are causing material injury, or threatening to cause material injury, to a U.S. industry. See

section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; otherwise, the investigation will proceed according to statutory and regulatory time limits.

#### Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures, 73 FR 3634. Parties wishing to participate in this investigation should ensure that they meet the requirements of these procedures (e.g., the filing of letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information. See section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all segments of any antidumping duty or countervailing duty proceedings initiated on or after March 14, 2011. See Certification of Factual Information to Import Administration during Antidumping and Countervailing Duty Proceedings: Interim Final Rule, 76 FR 7491 (February 10, 2011) (Interim Final Rule) amending 19 CFR 351.303(g)(1) and (2). The formats for the revised certifications are provided at the end of the Interim Final Rule. The Department intends to reject factual submissions in any proceeding segments initiated on or after March 14, 2011, if the submitting party does not comply with the revised certification requirements.

This notice is issued and published pursuant to section 777(i) of the Act.

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Paul Piquado  
Assistant Secretary  
for Import Administration

\_\_November 8, 2011\_\_  
Date



## **Appendix I**

### **Scope of the Investigation**

The merchandise covered by this investigation are crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

This investigation covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Subject merchandise may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of subject merchandise are included in the scope of this investigation.

Excluded from the scope of this investigation are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of this investigation are crystalline silicon photovoltaic cells, not exceeding 10,000mm<sup>2</sup> in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Merchandise covered by this investigation is currently classified in the Harmonized Tariff System of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020 and 8541.40.6030. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this investigation is dispositive.

